No. 16058

United States Court of Appeals

FOR THE NINTH CIRCUIT

SELDEN G. HOOPER,

Appellant,

vs.

C. C. HARTMAN, Rear Admiral USN, Commandant, Eleventh Naval District,

Appellee.

REPLY BRIEF

Appeal from the United States District Court for the Southern District of California Southern Division

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ARGUMENT

I

The Secretary of the Navy Is Not Indispensable To This Action.

The only argument raised in Appellee's Brief not fully covered in Appellant's Opening Brief is that of

jurisdiction. Appellee's major argument is that the Secretary of Navy is indispensable to this action. Appellant does not admit this claim but, assuming this is true arguendo, such a person need only be sued if the relief sought is a writ of prohibition, mandamus or an injunction under the Appellee's argument. The Government admits that there is a sufficient amount of controversy, together with a "Federal question." (Appellee's Brief, p. 7). However, the Government argues that a decree requiring action cannot be granted and, thus, no jurisdiction exists. This contention rests on the premise that no remedy can be given in this action. Therefore the question is one of availability of remedies and not of jurisdiction over the subject matter.

The lack of a coercive remedy is not decisive on the question of jurisdiction. Under the Taft-Hartley Act the Federal Courts have jurisdiction of a suit for breach of a collective bargaining agreement. However, the Norris-LaGuardia Act prohibits injunctions in such a suit, Textile Workers v. Lincoln Mills, 353 U.S. 448.

In this suit the Court below held that jurisdiction existed to grant a declaratory judgment. This was proper, since a declaratory judgment is a specific and separate remedy. A similar case is United Public Works v. Mitchell, 330 U.S. 75. There an injunction against enforcement of the Hatch Act was sought, together with a declaratory judgment. The Act was unconstitutional. In upholding the legality of the Act the Court held that it was not necessary to determine whether a court of equity would enforce by

injunction any judgment declaring rights, stating:

> "...we see no reason why a declaratory judgment action, even though constitutional issues are involved, does not lie." at p. 93.

Further it was stated:

> "A judgment, which, without more, adjudicates the status of a person is permissible under the Declaratory Judgment Act." At p. 119.

Declaratory relief is a proper remedy to determine the constitutionality of a Federal Act, Railway Conductors v. Swan, 329 U. S. 520; Currin v. Wallace, 306 U. S. 1.

The Commandant of the Eleventh Naval District is a sufficient defendant. He is the one that ordered the Court Martial, not the Secretary of the Navy. Appellant contends he did so without right. A suit is permitted against a public official who invades a private right, either by exceeding his authority or by carrying out a mandate of his superior, U. S. v. Lee, 106 U. S. 196.

The Appellee argues that no declaratory judgment could prevent the Secretary of the Navy from ordering another court martial of appellant. If jurisdiction existed in the initial Court Martial, then a subsequent trial by one would constitute double jeopardy. If jurisdiction did not exist in the original hearing it could never exist at a later date.

II

The Appellant Was Not Subject to Court Martial Jurisdiction.

The Appellee admits that Appellant was not "on duty" nor subject to the command of Appellee. The Government categorizes Appellant's position as one of being "a member at large", (Appellee's Brief p. 21). Thus it is tacitly admitted that Appellant had no existing relation to the military at the time of the alleged offense or the Court Martial.

This Court has held that the jurisdiction of a Court Martial under the Constitution is based on: "present relation to the Military", Lee v. Madigan, 248 F. 2d 783, 786, Cer't. granted, 356 U.S. 911 (9th Cir. (1957)) (emphasis added).

The argument that Appellant receives pay, and not a pension, to hold himself in readiness is not tenable. Retirement pay is based on years of prior service as well as rank, 10 U. S. C., Secs. 1332, 1333, 1334. Further, a retired officer may convert his retirement pay into annuity by election, 10 U. S. C. Sec. 1434. An annuity can hardly be said to constitute pay. Especially when payable to a widow.

Appellee has submitted the opinion of the Court of Military Appeals as part of its Brief. Being a Court of limited jurisdiction, this opinion is without force before this honorable body. The decision therein on further review has no effect on the question of exhausting remedies.

Even if exhaustion of military remedies is required before seeking a declaratory judgment, (such a holding would violate the language of the declaratory judgment statute) this Court should hold the case pending a final decision in the military appellate system, Gusik v. Schilder, 340 U. S. 128.

It is respectfully submitted that the decision should be reversed with directions to enter a judgment declaring Article 2(4) of the Uniform Code of Military Justice unconstitutional.

HILLYER & CRAKE

By OSCAR F. IRWIN